

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

CHRISTOPHER J. WILLING,

Plaintiff,

V.

ARMS, *et al.*,

Defendants.

Case No. 2:14-cv-01122-APG-PAL

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

(ECF Nos. 73, 91, 95, 109, 110, 113, 123, 124)

Pro Se plaintiff Christopher J. Willing brings this lawsuit under 42 U.S.C. § 1983 alleging violation of his constitutional rights with respect to the medical treatment he received as a detainee at the Nye County Detention Center. Presently before me are summary judgment motions filed by defendants Healthcare Partners (ECF No. 73), Nye County (ECF No. 95), and Deputy Arms (ECF No. 110).¹ Those motions demonstrate that Deputy Arms did not contribute to any alleged injuries Willing suffered, and that neither Nye County nor Healthcare Partners had a custom or policy that amounted to deliberate indifference of Willing's constitutional rights. Thus, I would grant the motions for summary judgment. However, the defendants have not properly authenticated the exhibits on which they rely, so I cannot grant the motions. Instead, I will allow the defendants a brief opportunity to authenticate the exhibits.

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¹ A number of additional motions have spawned from the summary judgment motions: Willing's Motion in Evidence in Support of Opposition to Summary Judgment (ECF No. 91), Nye County and Deputy Arms' Motion for Leave to Supplement (ECF No. 123), Healthcare Partners' Joinder in that motion (ECF No. 124), Willing's Motion for Nye County to Show Good Cause for Violating Discovery Request or Alternative to Compel (ECF No. 113), and Nye County's Motion to Strike (ECF No. 109).

1 **I. BACKGROUND**

2 Willing was a pretrial detainee at the Nye County Detention Center (“NCDC”) from August
 3 12, 2013 through December 29, 2014. ECF No. 110 at 15 ¶ 4. NCDC had a Policy and Procedure
 4 for Medical Services that specifically prohibited jail employees from refusing or hindering medical
 5 care to inmates. ECF No. 95-4 at 2. Nye County had an Indigent Inmate Policy pursuant to Nevada
 6 Revised Statutes Chapter 428, which NCDC incorporated. ECF No. 95-3 at 26. Pursuant to those
 7 policies, on at least eight occasions Willing was transported to and treated at Healthcare Partners,
 8 a private entity in Pahrump, Nevada, for a variety of non-emergent medical conditions. ECF No.
 9 73-1 at 1-5.

10 Willing complains about the treatment he received relating to a fractured clavicle that he
 11 claims occurred when he fell on some stairs at NCDC sometime in November 2013. Willing was
 12 transported to Healthcare Partners on January 20, 2014 complaining of left clavicle pain and a
 13 “tumor” on his shoulder. ECF No. 73-1 at 1 ¶ 1. Dr. Engelberg diagnosed the “tumor” as a possible
 14 lipoma and referred Willing to a general surgeon. ECF No. 73-2 at 32. Dr. Engelberg further noted
 15 that Willing “denied being there for his collar bone or other complaints but stated that he is here
 16 for a tumor on his shoulder....” *Id.* Willing disputes that he refused treatment for his fractured
 17 clavicle because he listed it as a chief complaint at the visit. ECF No. 73-2, Exh. C at 16:1-20.²
 18 Willing contends that he should have received x-rays and a referral for an orthopedic surgeon. ECF
 19 No. 73-2, Exh. C at 28:11-22.

20 On March 23, 2014, Willing was transported to Healthcare Partners for head and neck pain
 21 he claims started when he fell out of his out of his bunk and hit his head on the concrete floor. ECF
 22 No. 73-1 at 2 ¶ 3. Willing claims this occurred because of the fractured clavicle, as he had to sleep
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28 ² All citations to Exhibit C (ECF 73-2 at 68-86) reference the page number of Willing’s
 deposition transcript, rather than the ECF page number.

1 on his left side which caused his arm to become “paralyzed.” ECF No. 69 at 4. Willing was
2 prescribed Cyclobenzaprine HCl (muscle relaxer) and ibuprofen for the pain and x-rays were
3 subsequently taken of his C-spine. ECF No. 73-2 at 14; ECF No. 73-2 at 43, 50.

4 On April 12, 2014, Willing was transported to Healthcare Partners complaining of urinary
5 frequency. ECF No. 73-1 at 2 ¶ 5. Willing was treated and an x-ray was ordered for his clavicle
6 injury. ECF No. 73-2 at 48. Willing was continued on the muscle relaxer and ibuprofen as treatment
7 for the pain. *Id.*

8 On April 20, 2014, Willing was transported to Healthcare Partners by Deputy Arms for the
9 x-ray of his clavicle. ECF No. 73-1 at 2 ¶ 6. Dr. Flowers reviewed the x-ray before Willing left the
10 facility. ECF No. 73-2 at 10. Willing claims that Dr. Flowers indicated he was going to refer him
11 to an orthopedic surgeon for the clavicle fracture. ECF No. 73-2, Exh. C at 37:1-7. Willing further
12 alleges that Deputy Arms told the nurse or x-ray technician that “Nye County would not pay for it
13 and not to submit the referral.” ECF No. 73-2, Ex. C at 37:7-15. Deputy Arms denies telling the x-
14 ray technician not to submit any referral for an orthopedic surgeon. ECF No. 110 at 15 ¶ 9. Deputy
15 Arms recalls Dr. Flowers indicating that Willing’s clavicle was broken and would need surgery to
16 correct, but “it is not life threatening,” and “that any surgery to correct his clavicle would be
17 cosmetic in nature.” ECF No. 110 at 15 ¶¶ 7, 9; ECF No. 114 at 54.

18 On April 21, 2014 Radiologist Benjamin Muir, MD read the x-ray of Willing’s clavicle and
19 reported: “Healed left mid clavicle fracture with deformity. This fracture appeared acute on the
20 prior comparison exam [of 11/26/2012]. There is mild inferior angulation distal fracture.” ECF No.
21 73-2 at 41.

22 On October 12, 2014 Willing was transported to Healthcare Partners for headaches and
23 chronic pain relating to the collarbone injury. ECF No. 73-1 at 3 ¶ 9. Willing claims that Dr.
24 Flowers asked him why he never went to see the orthopedic surgeon in April. ECF No. 73-2, Exh.
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1 C at 46:17-23. Dr. Flowers reported that Willing was “[s]howing chronic pains, will repeat fill his
 2 ibuprofen, and will see if an orthopedic consult will determine if there is anything else to do about
 3 the clavicle fracture.” ECF No. 73-2 at 44. The referral to the orthopedic surgeon indicates
 4 “[f]racture of clavicle with delayed healing.” ECF No. 75 at 12.

5 On December 9, 2014 Willing was transported to Dr. Sep Bady at Advanced Orthopedics
 6 and Sports Medicine. ECF No. 73-1 at 3 ¶ 10. Another x-ray of Willing’s clavicle was taken and
 7 compared to the April 20, 2014 images. ECF No. 73-2 at 60. The radiologist reported:

8 FINDINGS:

9 Redemonstrated³ healed midshaft clavicular fracture with deformity, with mild
 10 inferior angulation of the distal fracture fragment, similar to previous. No definite
 11 acute fracture. There is no evidence of dislocation or subluxation. Bone
 12 mineralization is normal. There are no soft tissue abnormalities.

13 IMPRESSION:

14 Stable deformity with healed midshaft left clavicular fracture

15 *Id.* Dr. Bady did not recommend surgery to correct the deformity because Willing’s midshaft
 16 clavicular fracture was healed. ECF No. 73-2 at 60:17-19. According to Willing, Dr. Bady also
 17 noted that re-braking and plating the injury would “probably just hurt as bad.” ECF No. 73-2, Exh.
 18 C at 60:9-16.

19 Willing filed suit on July 7, 2014. ECF No. 1. Willing filed his First Amended Complaint
 20 (“FAC”) on August 21, 2015, asserting claims against Deputy Arms, Sargent Martinez, Nye
 21 County, Nye County Detention Center, Healthcare Partners, and Lieutenant Beard. ECF No. 69.
 22 Defendant Nye County Detention Center had previously been dismissed on August 4, 2015 (ECF
 23 No. 62) but was incorrectly named in the caption of the FAC. On August 26, 2016, Defendants
 24 Martinez and Beard were dismissed for failure to file proof of service. ECF No. 122. Thus, the

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 27 ³ “Re” is a prefix meaning “again” and “demonstrate” means “to show clearly.” Merriam-
 28 Webster’s Collegiate Dictionary (10th Ed. 2001). Accordingly, in this context “redemonstrated”
 means to show again.

1 remaining defendants are Healthcare Partners, Nye County, and Deputy Arms. They now seek
 2 summary judgment in their favor.

3 **II. LEGAL STANDARDS**

4 **A. Summary Judgment**

5 Summary judgment is appropriate when the pleadings, discovery responses, and affidavits
 6 “show there is no genuine issue as to any material fact and that the movant is entitled to judgment
 7 as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P.
 8 56(c)). For summary judgment purposes, the court views all facts and draws all inferences in the
 9 light most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793
 10 F.2d 1100, 1103 (9th Cir. 1986).

11 If the moving party demonstrates the absence of a genuine issue of material fact, the burden
 12 shifts to the nonmoving party to “set forth specific facts showing that there is a genuine issue for
 13 trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Celotex*, 477 U.S. at 323. To
 14 establish a factual dispute, the nonmoving party need not establish a material issue of fact
 15 conclusively in its favor. It is sufficient that “the claimed factual dispute be shown to require a jury
 16 or judge to resolve the parties' differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac.*
 17 *Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987).

18 However, the nonmoving party “must do more than simply show that there is some
 19 metaphysical doubt as to the material facts.” *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 783 (9th
 20 Cir. 2002) (internal citations omitted). He “must produce specific evidence, through affidavits or
 21 admissible discovery material, to show” a sufficient evidentiary basis on which a reasonable fact
 22 finder could find in his favor. *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991);
 23 *Anderson*, 477 U.S. at 248-49. At summary judgment, a court's function is not to weigh the
 24 evidence and determine the truth but to determine whether there is a genuine issue for trial. See
 25 *Anderson*, 477 U.S. at 249.

26 Finally, a party must support or refute the assertion of a fact with admissible evidence. Fed.
 27 R. Civ. P. 56(c)(1); *Orr*, 285 F.3d at 773; *Harris v. Graham Enterprises, Inc.*, 2009 WL 648899, at
 28 *2 (D. Ariz. Mar. 10, 2009). As the summary judgment procedure is the pretrial functional

1 equivalent of a directed-verdict motion, it requires consideration of the same caliber of evidence
 2 that would be admitted at trial. *Anderson*, 477 U.S. at 251 (citing *Bill Johnson's Restaurants, Inc.*
 3 v. *NLRB*, 461 U.S. 731, 745 n. 11 (1983)). Thus, it is insufficient for a litigant to merely attach a
 4 document to a summary judgment motion or opposition without affirmatively demonstrating its
 5 authenticity.

6 **B. 42 U.S.C. § 1983**

7 A plaintiff may bring a suit under § 1983 to redress “rights, privileges, or immunities
 8 secured by the [United States] Constitution and [federal] laws” that occur under the color of state
 9 law. 42 U.S.C. §1983. Section 1983 “is not itself a source of substantive rights, but merely
 10 provides a method for vindicating federal rights elsewhere conferred.” *Albright v. Oliver*, 510 U.S.
 11 266, 271 (1994) (quotation omitted). “To state a claim under § 1983, a plaintiff must [1] allege the
 12 violation of a right secured by the Constitution and laws of the United States, and must [2] show
 13 that the alleged deprivation was committed by a person acting under color of state law.” *West v.*
 14 *Atkins*, 487 U.S. 42, 48 (1988) (citation omitted).

15 For purposes of claims brought under § 1983, a private entity like Healthcare Partners is
 16 treated as a municipality. *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir.2012).
 17 Municipalities are not “vicariously liable for the deprivation of constitutional rights by employees.”
 18 *Flores v. Cnty. of Los Angeles*, 758 F.3d 1154, 1158 (9th Cir. 2014) (citing *Monell v. Dep’t of Soc.*
 19 *Servs. Of City of N.Y.*, 436 U.S. 658, 694 (1978)). To be liable, the municipality itself must
 20 deliberately implement a policy or custom which causes a constitutional violation.

21 **III. ANALYSIS**

22 In Count I of the FAC, Willing alleges that on January 20, 2014, Nye County and Healthcare
 23 Partners intentionally delayed his medical treatment in violation of the Eighth Amendment. Willing
 24 contends that Healthcare Partners’ physician, following an “unwritten” policy with Nye County,
 25 did not refer him to an orthopedic surgeon for his fractured clavicle.

26 In Count II of the FAC, Willing alleges that on April 20, 2014, Nye County, Healthcare
 27 Partners, and Deputy Arms intentionally denied and delayed his medical care in violation of the
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1 Fourteenth Amendment when Deputy Arms, while following the unwritten policy, told Healthcare
 2 Partners' nurse or x-ray technician not to submit a referral for an orthopedic surgeon because Nye
 3 County would not pay for it.

4 In Count III of the FAC, Willing alleges that on May 5, 2015 and June 5, 2014, Nye County
 5 intentionally delayed his medical treatment in violation of the Eighth Amendment when Sergeant
 6 Martinez followed the unwritten policy by refusing to address Willing's request to be taken to a
 7 different medical provider. Willing also alleges that in October or November 2014 Healthcare
 8 Partners intentionally delayed his medical treatment in violation of the Eighth Amendment when a
 9 referral for an orthopedic surgeon was never faxed to NCDC, but was instead mailed to Willing.

10 Willing contends that these constitutional violations caused him harm because by the time
 11 he saw an orthopedic surgeon, his collarbone had healed improperly, resulting in the orthopedic
 12 surgeon not recommending surgery to correct the deformity. As such, Willing claims he is now
 13 left with a deformed clavicle and chronic pain.

14 Willing's claims are tied to an alleged unwritten policy between Nye County and Healthcare
 15 Partners. He alleges that this unwritten policy involved Healthcare Partners not referring indigent
 16 inmates for follow-up diagnoses or treatment unless they were "dying" so Nye County would not
 17 have to pay for the treatment. Both Healthcare Partners and Nye County deny having any such
 18 unwritten policy to deny medical care based on inmates' inability to pay.

19 **A. The Defendants' Failure to Authenticate Evidence**

20 "A trial court can only consider admissible evidence in ruling on a motion for summary
 21 judgment." *Orr*, 285 F.3d at 773 (citations omitted). The Ninth Circuit has "repeatedly held that
 22 unauthenticated documents cannot be considered in a motion for summary judgment." *Id.* The
 23 defendants attempt to authenticate their exhibits through the affidavits of their lawyers. ECF No.
 24 73-2 at 1-2; ECF No. 95-1 at 1-2; ECF No. 110 at 18-19 (attaching ECF No. 95-1 despite the fact
 25 that it relates to different exhibits). This is improper.

26 Documents may be authenticated through (1) the personal knowledge of a party who attests
 27 that the document is what it purports to be, or (2) any other manner permitted by Federal Rules of
 28 Evidence 901(b) or 902. Documents authenticated through personal knowledge must be attached

1 to or referenced either in an affidavit signed by a person with personal knowledge about the
 2 document (such as the custodian of the document kept in the ordinary course of a business) or in
 3 properly authenticated deposition testimony in which the same information was elicited.²

4 Healthcare Partners offers the declaration of its counsel stating that the exhibits are “true
 5 and correct [copies] of Plaintiff’s medical records from Healthcare Partners.” ECF No. 73-2 at 1.
 6 Nothing indicates that counsel is the custodian of records of those documents, that she is aware of
 7 how the records were kept and retrieved, or that she has personal knowledge of those records. She
 8 could not authenticate those records at trial, and thus she cannot authenticate them in the motion.
 9 *Anderson*, 477 U.S. at 251 (holding that because summary judgment is the pretrial functional
 10 equivalent of a directed-verdict motion, it requires consideration of the same caliber of evidence
 11 that would be admitted at trial). Nye County and Deputy Arms’ attempts to authenticate their
 12 exhibits (except for the deposition transcript) are similarly defective.

13
 14 As discussed below, the motions for summary judgment would be granted if the evidence
 15 they are based upon were properly authenticated. It would be a waste of judicial and the parties’
 16 resources to proceed to trial simply to authenticate the evidence. Justice dictates that I afford the
 17 defendants a brief opportunity to authenticate their exhibits. If they can properly do so, I will grant
 18 the motions for summary judgment. If they cannot, then I will deny the motions. In the interim,
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24 ² See *Orr*, 285 F.3d at 773-74 (“documents authenticated through personal knowledge must
 25 be “attached to an affidavit that meets the requirements of Fed. R. Civ. P. 56(e) and the affiant must
 26 be a person through whom the exhibits could be admitted into evidence.”); see also *id.* at 774
 27 (deposition transcripts are authenticated “by attaching the cover page of the deposition and the
 28 reporter’s certification to every deposition extract submitted. It is insufficient for a party to submit,
 without more, an affidavit from her counsel identifying the names of the deponent, the reporter,
 and the action and stating that the deposition is a ‘true and correct copy.’ Such an affidavit lacks
 foundation even if the affiant-counsel were present at the deposition.”).

1 and presuming the defendants will be able to authenticate their exhibits, I set forth below my
 2 analysis of the merits of the defendants' motions.

3 **B. Claim Against Deputy Arms (Count II)**

4 Willing's only claim against Deputy Arms alleges that on April 20, 2014, Deputy Arms told
 5 Healthcare Partners' nurse or x-ray technician not to submit Dr. Flowers' referral for the orthopedic
 6 surgeon. ECF No. 69 at 5. Willing asserts that this denial or delay of medical care constituted
 7 deliberate indifference, in violation of his Fourteenth Amendment rights. Deputy Arms moves for
 8 summary judgment arguing that there is no evidence that he intentionally delayed or denied
 9 Willing's treatment.

10 The medical treatment a prisoner receives is subject to scrutiny under the Eighth
 11 Amendment. Deliberate indifference to a prisoner's serious medical needs or a serious risk to his
 12 safety violates the Eighth Amendment's proscription against cruel and unusual punishment. *Estelle*
 13 *v. Gamble*, 429 U.S. 97, 104 (1976). Because pretrial detainees' rights under the Fourteenth
 14 Amendment are comparable to prisoners' rights under the Eighth Amendment, however, the court
 15 applies the same analysis. *Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1243-44 (9th Cir. 2010)
 16 *overruled on other grounds by Castro v. Cty. of Los Angeles*, No. 12-56829, 2016 WL 4268955
 17 (9th Cir. Aug. 15, 2016). Thus, I analyze Willing's Fourteenth Amendment claim against Deputy
 18 Arms under the Eighth Amendment.

19 The Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized
 20 standards, and decency" by prohibiting the imposition of cruel and unusual punishment by state
 21 actors. *Estelle*, 429 U.S. at 102 (quotation omitted). The Constitution's stricture against the
 22 "unnecessary and wanton infliction of pain" encompasses deliberate indifference by state officials
 23 to the medical needs of prisoners. *Id.* at 104. It is well-settled law that "deliberate indifference to
 24 a prisoner's serious illness or injury states a cause of action under § 1983." *Id.* at 105.

25 In the Ninth Circuit, deliberate indifference claims are analyzed under a two-part test. "In
 26 order to prevail on an Eighth Amendment claim for inadequate medical care, a plaintiff must show
 27 ... an objective standard—that the deprivation was serious enough to constitute cruel and unusual
 28 punishment—and a subjective standard—deliberate indifference." *Colwell v. Bannister*, 763 F.3d

1 1060, 1066 (9th Cir. 2014). The objective prong examines whether the plaintiff has a “serious
 2 medical need.” *Id.* (citing *Estelle*, 429 U.S. at 104.) To show a serious medical need, the plaintiff
 3 must demonstrate that “failure to treat a prisoner’s condition could result in further significant
 4 injury or the unnecessary and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th
 5 Cir. 2006) (quotation omitted).

6 The subjective prong considers whether defendant’s response to the need was “deliberately
 7 indifferent.” *Id.* To establish deliberate indifference, the plaintiff must show “(a) a purposeful act
 8 or failure to respond to a prisoner’s pain or possible medical need and (b) harm caused by the
 9 indifference[,]” although it does not have to be “substantial” harm. *Id.* (citation omitted). Deliberate
 10 indifference “may appear when prison officials deny, delay or intentionally interfere with medical
 11 treatment, or it may be shown by the way in which prison officials provide medical care.” *Id.*
 12 (quotation omitted). Deliberate indifference is present when a prison official “knows of and
 13 disregards an excessive risk to inmate health or safety; the official must both be aware of the facts
 14 from which the inference could be drawn that a substantial risk of serious harm exists, and he must
 15 also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Finally, where delay in
 16 receiving medical treatment is alleged, a prisoner must demonstrate that the delay led to further
 17 injury. *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992) *overruled on other grounds by*
 18 *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1977).

19 Taking the evidence in the light most favorable to Willing, Deputy Arms cannot be held
 20 liable for any of Willing’s alleged damages. Willing asks me to infer that not being referred to an
 21 orthopedic surgeon on April 20, 2014 caused him harm or further injury because the fracture could
 22 have been surgically repaired at that time. However, the medical evidence unequivocally
 23 establishes that Willing’s clavicle fracture was already healed by April 20, 2014. Specifically, the
 24 April 20, 2014 x-ray showed a “[h]ealed left mid clavicle fracture with deformity.” ECF No. 73-2
 25 at 63. The December 9, 2014 x-ray “[r]edemonstrated [a] healed midshaft left clavicular fracture
 26 with deformity . . . similar to previous.” ECF No. 73-2 at 60. Not only did Dr. Bady not recommend
 27 surgery to correct the deformity in December but according to Willing, he opined that re-braking
 28 and plating the injury would “probably hurt just as bad.” ECF No. 73-2, Ex. C at 60:9-16. Thus,

1 by April 20, 2014 Willing’s clavicle was already healed (properly or not), so Deputy Arms’ alleged
 2 refusal to allow a referral to a surgeon could not have contributed to Willing’s damages. Beyond
 3 the allegations that his clavicle is deformed and he experiences pain—which were already present
 4 in April 2014 according to the medical records—Willing provides no other evidence that delayed
 5 treatment caused additional damages or that Deputy Arms is responsible for his injuries. No
 6 reasonable trier of fact could conclude that Deputy Arms’ actions on April 20, 2014 caused or
 7 contributed to Willing’s damages.

8 Moreover, “[u]nder the [deliberate indifference] standard, the prison official must not only
 9 ‘be aware of the facts from which the inference could be drawn that a substantial risk of serious
 10 harm exists,’ but that person ‘must also draw the inference.’” *Gibson, v. Cty. of Washoe, Nev.*, 290
 11 F.3d 1175, 1188 (9th Cir. 2002) *overruled on other grounds by Castro v. Cty. of Los Angeles*, No.
 12 12-56829, 2016 WL 4268955 (9th Cir. Aug. 15, 2016) (“If a person should have been aware of the
 13 risk, but was not, then the person has not violated the Eighth Amendment, no matter how severe
 14 the risk.”). Willing fails to establish that Deputy Arms drew an inference that a risk of serious harm
 15 existed (or even that a genuine dispute exists about such an inference). Deputy Arms understood
 16 Dr. Flowers’ diagnosis to be that Willing’s clavicle needed surgery to correct the deformity, but it
 17 was not “life threatening” and “that any surgery to correct his clavicle would be cosmetic in nature.”
 18 ECF No. 110 at 15 ¶¶ 7, 9. Willing has not presented evidence to establish that Deputy Arms drew
 19 an inference that a risk of serious harm existed, given that the injury was at least five-months old
 20 and non-emergent, and any surgical correction would be cosmetic only. *Farmer*, 511 U.S. at 842
 21 (“Whether a prison official had the requisite knowledge of a substantial risk is ... subject to
 22 demonstration in the usual ways, including inference from circumstantial evidence ... and a
 23 factfinder may conclude that a prison official knew of a substantial risk from the very fact that the
 24 risk was obvious.”).

25 Finally, before it can be said that a prisoner’s rights to medical care have been abridged,
 26 “the indifference to his medical needs must be substantial.” *Broughton v. Cutter Labs*, 622 F.2d
 27 458, 460 (9th Cir. 1980). There is no dispute that Willing experienced pain as a result of the healed
 28 clavicle injury. However, Healthcare Partners’ physicians treated the pain. Willing was prescribed

1 ibuprofen and muscle relaxer in early 2014 and Healthcare Partners' physicians continued this
 2 course of treatment through 2014. Approximately eleven months after the injury occurred, Dr.
 3 Flowers noted that the pain appeared to be chronic and referred Willing to an orthopedic surgeon
 4 "to determine if there is anything else to do about the clavicle fracture." ECF No. 73-2 at 44.
 5 Willing does not allege that this treatment was inappropriate or that Deputy Arms interfered with
 6 it in any way.

7 No reasonable jury could find that Deputy Arms was deliberately indifferent to Willing's
 8 serious medical needs. Accordingly, summary judgment will be granted in favor of Deputy Arms
 9 if he is able to properly authenticate the exhibits supporting his motion.

10 **C. *Monell* Claims against Nye County and Healthcare Partners (Counts I, II, and
 11 III)**

12 Local government units are "persons" for purposes of § 1983. *Monell v. Dep't of Soc. Servs.
 13 Of City of N.Y.*, 436 U.S. 658, 690 (1978). A municipal entity may be liable under § 1983 "only
 14 where the municipality itself causes the constitutional violation through execution of a
 15 government's policy or custom, whether made by its lawmakers or by those whose edicts or acts
 16 may fairly be said to represent official policy." *Ulrich v. City & Cty. of S.F.*, 308 F.3d 968, 984 (9th
 17 Cir. 2002) (quoting *Monell*, 436 U.S. at 694).

18 To establish municipal liability, a plaintiff must demonstrate (1) that a municipal employee
 19 violated the plaintiff's rights, (2) that the municipality had customs or policies that amount to
 20 deliberate indifference of the plaintiff's constitutional rights, and (3) that these customs or policies
 21 were the moving force behind the employee's violation of the plaintiff's constitutional rights.
 22 *Gibson*, 290 F.3d at 1193–94 (citation omitted).

23 Willing alleges that Nye County and Healthcare Partners had an unwritten policy to not
 24 refer indigent inmates for follow-up diagnoses or treatment unless they were dying so Nye County
 25 would not have to pay. Even assuming *arguendo* that Willing suffered a constitutional deprivation,
 26 Nye County or Healthcare Partners can be liable only if Willing shows that the constitutional
 27 deprivation "was caused by employees acting pursuant to an official policy or 'longstanding
 28 practice or custom,' or that the injury was caused or ratified by an individual with 'final policy-

1 making authority.”⁴ *Chudacoff v. Univ. Med. Ctr. of S. Nevada*, 649 F.3d 1143, 1151 (9th Cir.
 2 2011) (quoting *Villegas v. Gilroy Garlic Festival Ass’n*, 541 F.3d 950, 964 (9th Cir. 2008)). Willing
 3 does not argue, nor is there evidence to support, that any person with “policy-making authority”
 4 from Nye County or Healthcare Partners either committed the alleged constitutional violations or
 5 ratified the conduct of any employee.

6 Willing has not presented any evidence from which a rationale trier of fact could infer that
 7 any policy of Nye County was the moving force behind the alleged constitutional deprivation. A
 8 policy is a “deliberate choice to follow a course of action … made from among various alternatives
 9 by the official or officials responsible for establishing final policy with respect to the subject matter
 10 in question.” *Long v. Cty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006) (alteration in
 11 original) (quotation omitted). Nye County has presented evidence showing that it had an official
 12 Indigent Inmate Policy regulating access to medical care pursuant to NRS 211.140, and that NCDC
 13 had a policy and procedure for medical services. Neither policy permits non-medical jail
 14 employees to diagnose or treat an inmate. Willing offers no evidence that either policy contributed
 15 to a violation of his rights.⁵

16 “Absent a formal governmental policy, [the plaintiff] must show a ‘longstanding practice
 17 or custom which constitutes the standard operating procedure of the local government entity.’”
 18 *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (quoting *Gillette v. Delmore*, 978 F.2d 1342,
 19 1346-47 (9th Cir. 1992)). The custom or policy must be so “persistent and widespread that it
 20 constitutes a permanent and well settled city policy.” *Id.* (quoting *Monell*, 436 U.S. at 658).
 21 “Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be
 22 founded upon practices of sufficient duration, frequency and consistency that the conduct has
 23 become a traditional method of carrying out policy.” *Id.* (citation omitted).

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 25 ⁴ As explained above, Deputy Arms’ conduct did not amount to deliberate indifference.
 26 Thus, Willing’s municipal liability claim against Nye County relating to Deputy Arms’ conduct on
 27 April 20, 2014 fails as a matter of law.

28 ⁵ In fact, if Deputy Arms did tell Healthcare Partners’ nurse not to submit the referral, he
 arguably did not act in compliance with NCDC policy.

1 In support of his allegation that the defendants had an unwritten policy of causing indigent
 2 inmates to not be referred for follow-up diagnosis or treatment unless they are dying, Willing relies
 3 solely on his own speculation and two of his experiences related to the treatment of his fractured
 4 clavicle. But even taking these facts in the light most favorable to Willing, two examples are
 5 insufficient as a matter of law to demonstrate a longstanding policy or custom that is the “standard
 6 operating procedure” of the municipality. *See Meehan v. Cty. of Los Angeles*, 856 F.2d 102, 106-
 7 107 (9th Cir. 1988) (two instances not enough to establish custom). Willing’s arguments and
 8 evidence do not provide the duration, frequency, and consistency necessary to prove a “persistent
 9 and widespread” informal custom to deny indigent inmates medical care to avoid paying for that
 10 care. *Trevino*, 99 F.3d at 918

11 Willing also attempts to tie the unwritten policy to his allegation that NCDC’s responses to
 12 his grievances amounted to deliberate indifference. Specifically, he asserts that the jail personnel
 13 continued to take him to Healthcare Partners for treatment even though they knew about the
 14 unwritten policy between Nye County and Healthcare Partners. However, Healthcare Partners
 15 appeared to act as Willing’s primary medical care provider as it provided him with medical care on
 16 at least eight occasions for a variety of non-emergent medical issues. The fact that NCDC continued
 17 to take him there for treatment does not demonstrate a longstanding municipal practice or custom
 18 to deny indigent inmates medical care.

19 For these same reasons, Willing’s *Monell* claims against Healthcare Partners fail as a matter
 20 of law. Willing has not demonstrated that Nye County had any policy, written or unwritten, to deny
 21 indigent inmates medical care to avoid paying for the treatment. Thus, it follows that Healthcare
 22 Partners cannot share in enforcing (or be liable for) a non-existent policy, practice, or custom.
 23 Willing offers no other evidence that another Healthcare Partners policy, practice, or custom caused
 24 him injury. Accordingly, summary judgment will be granted in favor of both Healthcare Partners
 25 and Nye County if they are able to properly authenticate the exhibits supporting their motions.

26 **D. Additional Motions**

27 Based on the above analysis of the summary judgment motions, if defendants are able to
 28 properly authenticate the exhibits supporting their motions, I will deny the following motions as

1 moot: (1) Willing's Motion in Evidence in Support of Opposition to Summary Judgment (ECF No.
2 91), (2) Nye County and Deputy Arms' Motion for Leave to Supplement (ECF No. 123), Healthcare
3 Partners' Joinder in that motion (ECF No. 124), Willing's Motion for Nye County to Show Good
4 Cause for Violating Discovery Request or Alternative to Compel (ECF No. 113), and Nye County's
5 Motion to Strike (ECF No. 109).

6 **IV. CONCLUSION**

7 IT IS THEREFORE ORDERED that the defendants shall have until **September 27, 2016**
8 to submit supplemental affidavits authenticating the exhibits attached to their respective motions
9 for summary judgment. If the exhibits are properly authenticated, I will grant their motions for
10 summary judgment (ECF Nos. 73, 95, and 110). If they fail to properly authenticate the exhibits,
11 I will deny the motions.

12 DATED THIS 19th day of September, 2016.



13 ANDREW P. GORDON
14 UNITED STATES DISTRICT JUDGE

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